



DOMESTIC VIOLENCE SENTENCING REFORM

ENHANCED PENALTIES FOR REPEAT/SERIAL DOMESTIC VIOLENCE OFFENDERS

WASHINGTON STATE OFFICE OF ATTORNEY GENERAL
ROB MCKENNA



2009 LEGISLATIVE SESSION

DOMESTIC VIOLENCE SENTENCING REFORM

FELLOW WASHINGTONIANS,

Serial domestic violence offenders pose an unacceptable threat to our communities. For years victims and their allies have complained that our state requires more severe punishments for serial car thieves and drug dealers than for serial domestic abusers.

"I've witnessed the plight of hundreds of domestic violence victims who no longer cooperate with law enforcement or the courts because their experience has taught them that their abusive partners will not be held accountable, even after multiple convictions," says Keith Galbraith, the director of Family Renewal Center, a domestic violence shelter in Tacoma.

David Martin, head of the King County Prosecutor's Office Domestic Violence Unit, agrees. He points to offenders like Damon Overby, who accumulated eight domestic violence convictions for assaults on four women over 18 years. Yet after receiving his latest felony conviction for a brutal attempt to suffocate a girlfriend, Overby was sentenced to only 12 months of work release.



On the pages that follow, you will find more examples of abusers who have escaped the kinds of prison terms that would more appropriately match our collective disgust of domestic abuse. At the same time, these shockingly short sentences have robbed victims of a chance to move on and rebuild their lives.

In February 2007, I convened my domestic violence advisory committee. This task force of leading prosecutors, police officers and victim advocates is recommending new solutions to protect the victims of chronic abusers. The task force asserts that sentencing rules for chronic abusers have proved inadequate because they do not require judges to take into account the previous misdemeanor domestic violence convictions of the most dangerous offenders. This demands immediate action.

The legislation they have drafted offers relief to the victims of domestic violence, brings abusers to justice, and treats serial domestic violence with the seriousness it deserves.

Thank you to the dedicated public servants and advocates who have served on our task force over the past two years. Their counsel has led to the most important proposed update to our domestic violence protections since the Domestic Violence Prevention Act first became law some 25 years ago.

I look forward to working with you to guide these proposals successfully through the legislative process in 2009.

Sincerely,

A handwritten signature in black ink that reads "Rob McKenna".

Rob McKenna



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ENHANCED PENALTIES FOR REPEAT/SERIAL DOMESTIC VIOLENCE OFFENDERS.

Over the past thirty years the criminal justice response to domestic violence has stressed accountability for domestic violence offenders and safety for victims. From training to dedicated police, advocates, courts, and prosecutors the criminal justice system has made domestic violence a priority. That commitment, however, is not reflected in the sentencing of repeat felony domestic violence offenders. The hard work of pursuing and prosecuting repeat domestic violence offenders too often results in weak sentences that fail to protect the victim or to properly account for prior domestic violence convictions. The result is multifold. Repeat offenders become indifferent to legal consequences of their actions. The cycle of domestic violence continues unabated. Victims are put at greater risks due to the ineffective intervention of the criminal justice system. And many victims lose hope and motivation. In short, the message to the community about domestic violence is diluted and even contradictory. The sentencing of repeat domestic violence offenders requires immediate attention.

HISTORY:

In 1979, the Washington State legislature passed the Domestic Violence Prevention Act (DVPA) RCW 10.99, Washington's official response to the problem of domestic violence. The law recognized domestic violence as a "serious crime and intended to provide maximum protection from abuse for victims of domestic violence." RCW 10.99.010. The purpose of the DVPA was not to establish new crimes, but to ensure that existing statutes would be fully and equally enforced in domestic violence situations. RCW 10.99.010, and Roy v. City of Everett, 118 Wn. 2d 352, 358 (1992).

A few years later the Sentencing Reform Act (SRA) was enacted. No sentencing changes were made for repeat domestic violence offenders or consideration given to scoring domestic violence misdemeanor convictions. The SRA followed the lead of the DVPA, domestic violence sentences were to be treated just like other crimes. Since the enactment of the SRA in 1984, there have been multiple Legislative amendments to the SRA that specifically deal with repeat offenders for certain types of crimes. Felony domestic violence crimes have not been a part of those changes. The protection of victims and society in the domestic violence arena remains a high priority. Criminal sanctions for repeat domestic violence offenders need to change to properly reflect the danger to society, the danger to victims and more accurately the criminal conduct of repeat abusers.

CURRENT EXAMPLES:

The lack of tough sentences allows serial domestic violence offenders to continue to commit these dangerous and damaging offenses with limited consequence. For example, in a recent King County case State v. Gary Ruffcorn the defendant was charged with Assault in the Second degree domestic violence for a brutal assault upon his girlfriend.

Ruffcorn had a long documented history of misdemeanor domestic violence abuse: six prior convictions for Assault in the Fourth degree domestic violence, three convictions for violation of a no contact order, and two felony drug



convictions. Ruffcorn’s legacy of domestic violence was well known to dozens of police and prosecutors throughout east King County. Even though his nine misdemeanor domestic violence convictions appear significant, when it came time to impose punishment, none of his convictions counted towards his offender score. Instead, his standard range was calculated only by adding a point for each of his non-violent drug convictions. The resulting standard range was little different than what he faced for a misdemeanor.¹

Other examples of repeat domestic violence offenders are found throughout the state. In a recent Thurston county case, State v. Marvin Greene, a repeat DV defendant had five misdemeanor domestic violence convictions (including twice for Assault 4 DV) involving the same victim. When he was convicted of a felony domestic violence charge for tampering with that victim he was sentenced as a first time felony offender with no consideration to his long DV history. In essence, the defendant faced less time for committing a felony domestic violence crime than for his prior misdemeanor domestic violence crimes.

In a Pierce county case, State v. L.A. Johnson, the defendant had a history of domestic violence involving the same victim and her children. He was recently convicted of a number of misdemeanor domestic violence crimes, including stalking, for his obsessive behavior. Once out of custody the defendant broke into the victim’s home. The victim came home from work, put the children to bed, and found the defendant hiding under her bed. His constant harassment and stalking of the victim and her children left her terrified. The defendant’s standard range does not consider his lengthy domestic violence history providing a sentence range less than a misdemeanor.

In a recent Snohomish county case, State v. Sam Cornish, the defendant had an extensive domestic violence relationship with his ex-wife. In the late 1990s he was convicted of five violations of no contact and felony stalking, and upon release pursued his ex-wife for several years. From 2000 to 2008 he was convicted of five additional domestic violence felony violations of no contact order. After ten years of criminal domestic violence offenses involving the same victim (eleven total) he faced a sentence commensurate with a third time burglar or car thief.

Unlike other repeat offenders whose prior convictions count more heavily when their current offense is for the same or similar conduct the repeat domestic violence felon faces no such concerns. The bottom line is prior domestic violence felony convictions are not multiplied and prior misdemeanor domestic violence convictions are not scored, no matter how many or if those involve the same victim or victim’s children. The failure to consider prior convictions has led to widening gaps for repeat domestic violence felons and other repeat criminal felons--all while domestic violence cases are an increasing priority for prosecutors throughout Washington.²

PROPOSED LEGISLATION:

Over the past two years the concern to appropriately sentence repeat domestic violence offenders has been a focus of the Washington State Attorney General’s Domestic Violence task force, and the Washington Association of Prosecuting Attorneys.³ Within the Attorney General’s Domestic Violence task force, a sanctions work group for repeat offenders formed consisting of representatives from several county prosecutors’ offices: Benton, Snohomish, Kitsap, Thurston, Spokane, Yakima, Pierce, Clark, and King; as well as representatives from the Attorney General’s Office, University of Montana School of Law, Crystal Judson Family Justice Center, and other advocacy organizations. The working group focused on repeat domestic violence felons and developed legislation to reform sentencing of repeat domestic violence felony offenders.⁴ The legislation described below has been adopted by the Attorney General’s Office and by the Washington Association of Prosecuting Attorneys: 

1. Washington does have an exceptional sentence provision for history of domestic violence, and it was used against Mr. Ruffcorn with success, but it does not mitigate the systemic lack of a multiplier or failure to score misdemeanor convictions. Many other offenses such as sex, drugs, violent, and economic crimes also carry exceptional sentences in addition to a multiplier and other sentencing enhancements. Finally, exceptional sentences are unreliable having been subject to attack on appeal and only recently allowed. The statewide application is limited, and in 2006 was used in less than a dozen cases.

2. The Legislature has added additional penalties for certain offenses, including longer sentences for offenses committed with a firearm or another deadly weapon, longer sentences for drug offenses committed in a “protected” zone and for drug offenses committed while confined in a jail or prison. There are no such additional penalties for domestic violence.

3. The task force helped bring about the Assault 2 strangulation legislation among other domestic violence changes.

4. The work group also examined several states that have aggravated punishment for cases with repeated prior incidences of domestic violence. Some states “stack” domestic violence offenses (increase penalties from misdemeanor to felony for repeated conduct) including: Alaska (§18.66.990, and 12.55), Alabama (§12-25-31), Arkansas (§5-26-303 to 309), Idaho (§18-918), Kansas (§12-3412), Louisiana (§14.35 and 14.79), Maryland (§14-101), Michigan (§750.81), Minnesota (§609.224), Mississippi (§97-3-7), Missouri (§565.070-074), Montana (§45-5-626), New Mexico (§31-18-15), Nevada (§200.485), North Carolina (§50B-4.1), Ohio (§2919.25), Oklahoma (§22.60.6), Texas (§22.01), Utah (§77.36.1.1), Virginia (§18.2). While some states also increase the class of the crime for repeat domestic violence offenders. See Missouri, New Mexico and Arkansas.

A. SCORE PRIOR MISDEMEANOR DOMESTIC VIOLENCE HISTORY

Repeat felony domestic violence offenders often begin their behavior as misdemeanor domestic violence offenders. These misdemeanor domestic violence convictions are not just important in sentencing repeat offenders, but are often just as meaningful to a victim and the victim's children as a felony.⁵ Though misdemeanors are generally not included in offender score calculations exceptions are made when they are particularly relevant such as felony traffic offenses (Vehicular Homicide, Vehicular Assault, Hit and Run Injury Accident.)⁶ This legislation proposes counting a certain class of prior domestic violence misdemeanor convictions in a felony domestic violence offender's score:

The scoring of a certain class of domestic violence misdemeanor offenses is modeled after the scoring of misdemeanors for felony traffic offenses and car thieves (e.g. DUI, Reckless, and Vehicle Prowl). RCW 9.94A.030(36) provides for specific "serious traffic offenses" in the offender score. Creating a category of "serious domestic violence" misdemeanors would count as one point towards a felony domestic violence offender score. A "serious domestic violence offense" would be defined as:

(a) Nonfelony domestic violence assault (RCW 9A.36.041), nonfelony domestic violence violation of a court order (No contact order under RCW 10.99, domestic violence protection order issued under RCW 26.09, 26.10, 26.26, or 26.50), nonfelony domestic violence harassment (RCW 9A.46.020), and nonfelony domestic violence stalking (RCW 9A.46.110); or (b) Any federal, out-of-state, county, tribal court, military, or municipal conviction for an offense that under the laws of this state would be classified as a serious domestic violence offense under (a) of this subsection.

The scoring of domestic violence misdemeanors would accomplish a critical step in sentencing repeat domestic violence offenders by officially recognizing hard fought misdemeanor domestic violence convictions. The domestic violence designation of a prior "serious domestic violence" conviction will have to be plead and proven in order to score the conviction (note, any change in penalty for domestic violence crimes will require this step to comply with *Blakely v. Washington* 542 U.S. 296 (2004).) Many prosecutors currently do not plead and prove DV allegations, and this will create an issue that will necessitate jurisdictions making a change.

B. MULTIPLY REPEAT DOMESTIC VIOLENCE FELONY CONVICTIONS.

The lack of a multiplier is a critical problem in holding the most egregious and dangerous domestic violence offenders (those with prior felony domestic violence convictions) accountable. Unlike drug, sex, burglaries, car theft, and felony traffic offenses where multiplying penalties significantly increase an offender's sentence, the SRA does not multiply offender scores for felony crimes of domestic violence. As a result, the penalties for repeat domestic violence, a behavior so wide spread it is well recognized in professional literature as the "cycle of violence," is among the lowest in felony criminal justice. The Sentencing Guidelines Commission commentary in the SRA on the role of criminal history is informative:

[T]he grid places an accelerated emphasis on criminal history for the repeat violent offender...[t]hus, a criminal history with serious violent crime convictions counts most heavily when the current offense is also a serious violent offense; previous convictions for violent offenses count more heavily when the current offense is violent; prior burglary convictions count more heavily when the current offense is a burglary; prior drug offenses count more heavily when the current offense is a drug offense; and prior violent felony traffic offenses count more heavily when the current offense is a felony traffic offense. The Legislature has subsequently provided for counting sex offenses more heavily when the current offense is a sex offense. Adult Sentencing Manual 2007 II-118



5. It is important to note that misdemeanor domestic violence convictions are often times more difficult to obtain than felony domestic violence convictions given the absence of obvious trauma or other physical evidence.

6. The Sentencing Guidelines commission recommended the following information for the scoring of misdemeanors in the comments to the SRA. *Misdemeanors: The Commission decided not to include misdemeanors in the offender score for two reasons: 1) the emphasis of the legislation was on felonies, and 2) the reliability of court records varies greatly throughout the state. An exception to this policy was made in the case of felony traffic offenses. The Commission decided that for these crimes, previous serious driving misdemeanors are relevant in establishing the offender's history of similar behavior. The Commission anticipates that in some instances an offender's history of misdemeanors may be used by the court in selecting a sentence within the standard sentence range or in departing from the range to administer an exceptional sentence. Adult Sentencing Manual 2007 II-118*

This legislation proposes multiplying or counting more heavily a certain class of prior domestic violence felony convictions. Designating a limited class of specific felony domestic violence convictions to be multiplied by adding to RCW 9.94A.525 (offender score calculation) the following language:

If the present conviction is for a felony domestic violence offense, count priors as in subsections (7) through (11) and (12) through (17) of this section; however count two points for each adult and juvenile prior conviction for Felony Violation No Contact Order/Protection Order (assault), Felony Harassment Domestic Violence, Felony Stalking Domestic Violence, Burglary 1 Domestic Violence, Kidnapping 1 and 2 Domestic Violence, Unlawful Imprisonment Domestic Violence, Robbery 1 and 2 Domestic Violence, Assault 2 and 3 Domestic Violence, or Arson 1 and 2 Domestic Violence; count one point for Felony Violation of a No Contact Order (two priors), Residential Burglary Domestic Violence; count one point for each serious domestic violence offense, other than those convictions that are an element of the offense being scored

In addition, amend 9.94A.030 (Sentencing Reform Act definitions) to add “domestic violence” defined as a criminal offense committed between a defendant and a victim having a relationship as defined in RCW 10.99.020 or 26.50.010.

This narrowly drawn multiplier for domestic violence felony crimes would not act as a blanket multiplier and instead focus on core domestic violence felonies. As above, the multiplier requires pleading and proving the domestic violence designation. The multiplier excludes domestic violence property crimes, Felony Violation of a No Contact Order (two prior offenses), and Residential Burglary domestic violence. The multiplier recognizes domestic violence as a distinct crime with punishment for repeat offenders of core offenses.

C. PLEAD AND PROVE DOMESTIC VIOLENCE DESIGNATION

In order to have domestic violence sentencing reform Blakely requires the domestic violence designation be plead and proven. Today being labeled a crime of “domestic violence” does not affect punishment. Appellate courts have found the current label of domestic violence means nothing.⁷ Any designation change will impact misdemeanor DV prosecutions. Jurisdictions will need to plead and prove designation where before they did not need to. The benefit of pleading and proving domestic violence is significant as history at the felony level would be given new meaning and repeat offenders would have tough sentences. There are also evidentiary advantages to pleading and proving domestic violence. In Kitsap County, they have plead and proven domestic violence for several years, without impact on their prosecutions.⁸ Further, even if one fails to prove the domestic violence designation the sentences would simply revert back to the sentencing structure currently in place.

D. INTENT

The intent section of any legislation should continue the theme from the Domestic Violence Prevention Act that states victims of DV will receive “the maximum protection from abuse which the law and those who enforce the law can provide.” (RCW 10.99). This section should recognize that sentences for repeat domestic violence felons should not be equal to non-domestic violence crimes, but reflect the seriousness, recidivism, and lethality that underlie such crimes. Constitutional protections, preventing later equal protection challenges, is a critical part. This section should clarify that recidivist felony domestic violence sentences are intended to be consistent with other recidivist sentencing schemes. This is taking the language of 10.99 about equality with non-domestic violence crimes a step further, calling for equality in recidivist sentencing. Finally, it should express the intent that the State deal strongly with repeat felony DV offenders who engage in a pattern of serial “domestic violence” and make offenses involving greater harm to DV victims and society result in greater punishment. The following intent language should be included in the definition of “domestic violence” within RCW 9.94A.030 (Sentencing Reform Act definitions):

The legislature recognizes the substantial and great impact upon society, families, children and the victims of offenses committed within a domestic relationship. The legislature recognizes the continuing nature of domestic violence, and

7. See State v. Spencer, 128 Wn. App. 132 (1-2005); State v. Felix, 125 Wash.App. 575, 105 P.3d 427 (2005). See also State v. Clark, unpublished opinion at 127 Wash.App. 1039 (2005).

8. In Pierce County, per domestic violence prosecutors Mary Robnett and Diane Clarkson, the prosecutor’s office pleads domestic violence in the charging document. In District Court prosecutors prove it to the jury while in Superior Court the practice has been to ask the judge to make the finding after trial.

the lasting psychological trauma caused by such violence. The legislature finds that the prevention of domestic violence, and the proper punishment for such offenses, is a compelling state interest that is not met under current sentencing provisions. Towards this end, this legislation is necessary to ensure that domestic violence offenders are punished accordingly, and an end to domestic violence can be achieved.

F. ADDITIONAL AGGRAVATING FACTORS

The current aggravating factor for a history of domestic violence only allows for exceptional sentences for a history of domestic violence with one victim. We constantly see recidivists who move from victim to victim engaging in battering. We should not limit exceptional sentences to the same victim, and should formally recognize the serial batterer.